Supreme Court, U.S.
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No. 90-741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALETHA DEWSNUP,

v. *Petitioner,*

LOUIS L. TIMM, JOHN NEIUWLAND and FLOYD M. CHILDS, Trustees of the UNITED PRECISION MACHINE AND ENGINEERING COMPANY PROFIT-SHARING TRUST, ABCO INSURANCE AGENCY, INC., and JOSEPH L. HENROID, as Trustee for the Annette Jacob Trust,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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ALETHA DEWSNUP,

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v.

LOUIS L. TIMM, JOHN NEIUWLAND AND FLOYD M. CHILDS, Trustees of the UNITED PRECISION MACHINE AND ENGINEERING COMPANY PROFIT-SHARING TRUST, ABCO INSURANCE AGENCY, INC., and JOSEPH L. HENROID, as Trustee for the Annette Jacob Trust,

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents concede that "Petitioner's reading of Section 506(d) has one . . . virtue: simplicity." Brief for the Respondents ("Resp. Br.") at 7. Correspondingly, the

inconsistent arguments offered by respondents and the government have one primary vice: a complexity that is wholly inconsistent with the plain and simple meaning of Section 506 of the Bankruptcy Code.[1]

In her opening brief petitioner urged that the court of appeals erred in holding that Section 506(d) is (1) not available to chapter 7 debtors, (2) not applicable to real property and (3) not applicable to abandoned property. Brief for the Petitioner ("Pet. Br.") at 9-11. Respondents apparently agree that the court's first ground is unsupportable, and make only a half-hearted attempt (*see* Part IV A. below) to support the second ground. The government does not support any of the three holdings, but seeks to support the court's result on an alternative ground not argued below. (*See* Part II below.) In taking these positions both respondents and the government seek to ignore the plain meaning of Section 506 and urge interpretations that require reading Section 506(d) in a vacuum, instead of as part of an entire section of the Bankruptcy Code designed to "govern[] the definition and treatment of secured claims." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 238-39 (1989). In particular, both respondents and the government ignore the close relationship between Section 506(a), which limits secured

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1 Of course, statutory language must be accepted as conclusive "in the absence of a 'clearly expressed legislative intent to the contrary.'" *United States v. Turkett*, 452 U.S. 576, 580 (1981). *Accord Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S 102, 108 (1980); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *United States Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 379-80 (1988).

claims to the value of the property, and Section 506(d), which voids a lien to the extent that it "is not an allowed secured claim." 11 U.S.C. § 506(d) (1988). The respondents argue that while Section *506(a)* applies to abandoned property, Section *506(d)* does not. The government urges that while Section *506(a)* applies to allowed claims, Section *506(d)* does not. Neither respondents nor the government cite any authority for their novel suggestions that Section 506(d) should be treated as unrelated to Section 506(a); clearly Section 506(d) cannot be read in isolation.

I. CONTRARY TO RESPONDENTS' ARGUMENT, SECTION 506(d), LIKE SECTION 506(a), APPLIES TO ABANDONED PROPERTY

Respondents rely almost exclusively on the third of the court of appeals' grounds -- that Section 506(d) does not apply to abandoned property. They argue that Section 506(d) is unavailable to petitioner because the property had been, or was about to be, abandoned by the Chapter 7 trustee at the time of the Section 506(a) valuation hearing. Resp. Br. at 11-20.

Essential to an understanding of this argument is a description of Section 506. Section 506(a) is designed to deal with the situation, not uncommon in bankruptcy, where a lien exceeds the current value of the property. Before the 1978 Bankruptcy Code, lienholders under this Court's decision in *Long v. Bullard*, 117 U.S. 617 (1886), could continue to retain their liens after bankruptcy. The result was that the property remained impaired by liens far exceeding the property's value. In the 1978 Code, Congress adopted Section 506 of the Bankruptcy Code to

deal with this situation. It provided in subsection (a) that, when the secured claim exceeded the value of the property, the creditor would have a secured claim only "to the extent of the value of . . . [the property]" and an "unsecured claim to the extent that the value of [the property] is less than the amount of such allowed claim." 11 U.S.C. § 506(a). In subsection (d), Congress provided that the lien represented by the unsecured claim would be "void" and that, in addition, any lien represented by a disallowed claim would be "void." In subsections (b) and (c), Congress dealt with the situation in which "the value of [the property] *is greater* than the amount of" the lien and provided that interest and the expenses of "preserving or disposing of" such property could be recovered. 11 U.S.C. § 506(b) and (c) (emphasis supplied); *See United States v. Ron Pair Enterprises*, 489 U.S. at 238-39.

Respondents do not dispute, as shown in petitioner's opening brief (Pet. Br. at 25-27), that Section 506(a) applies to abandoned property.[2] However, respondents argue (1) that Section 506(d) must be limited to "property in which the estate has an interest" because 506(a) is so limited (Resp. Br. at 12-13); (2) that Section 506(a) applies to abandoned property and by implication the phrase "property in which the estate has an interest" must

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2 Indeed, as petitioner explained in her opening brief, "property in which the estate has an interest" in Section 506(a) must include abandoned property in order for Section 722 to operate. Pet. Br. at 25-27.

include abandoned property (Resp. Br. at 9, 37); (3) but that 506(d) does not apply to abandoned property because the phrase "property in which the estate has an interest" when read into Section 506(d) should be construed to have a different meaning in Section 506(d) than in Section 506(a) and to be the equivalent of "property of the estate" (Resp. Br. at 14); and (4) that "property of the estate" does not include abandoned property. *Id.*

It is not an overstatement to characterize respondents' argument as nonsensical. The same phrase "property in which the estate has a interest" cannot have different meanings in the two subsections of Section 506, particularly when the sole basis of implying such a limitation in Section 506(d) is because the phrase appears in Section 506(a). Respondents' concession that petitioner's estate does have an "interest" in her abandoned property under Section 506(a) means that Section 506(d) must be equally applicable to abandoned property.

As petitioner showed in her opening brief (Pet. Br. at 27-28), Section 506(d) would have little significance if it did not apply to abandoned property. Because "the trustee may abandon any property of the estate that is . . . of inconsequential value and benefit to the estate," the trustee will typically abandon property encumbered by liens exceeding the value of the property. 11 U.S.C. § 554 (1988). If Section 506(d) cannot be applied to abandoned property, it will certainly be deprived of one of its central

functions.[3] In summary, there is no basis for suggesting that Section 506(d) does not apply to abandoned property.[4]

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3 In any event, both respondents and the government concede that the property here had *not* been abandoned at the time of the valuation hearing. Resp. Br. at 4-5; Brief of the United States as Amicus Curiae Supporting Respondents ("Gov't. Br.") at 4 n.3. By arguing that the July, 1988 abandonment prevents the June, 1987 application of Section 506(d), respondents are suggesting that Section 506(d) is inapplicable before and after property is abandoned. Under respondents' interpretation, Section 506(d) would never be applicable to over-encumbered property because the bankruptcy court can always assume, as it did in this case, "that the real property has been or will be abandoned to the debtors." Petition for a Writ of Certiorari ("Pet. App.") at 17a n.1.

4 Respondents assert three additional arguments for their "abandonment" position, each of which petitioner addressed in her opening brief. First, respondents argue that stripping down unsecured liens on abandoned property would not serve the goals of chapter 7. Resp. Br. at 17-23. As shown at page 17 of her opening brief, Section 506(d) furthers the fresh start policy by assisting the debtor in retaining "adequate property for a return to normal life. . . ." H.R. Rep. No. 595, 100th Cong., 1st Sess., at 125, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6086 (hereinafter "H.R. Rep."). Contrary to respondents' argument (Resp. Br. at 22-23), providing the debtor with adequate property with which to begin life anew is a part of Congress's fresh start policy completely separate from discharging the debtor from personal liability. Second, respondents argue that petitioner's interpretation would undermine Congress's preference for re-organization. Resp. Br. at 33-35.

II. THE GOVERNMENT'S ALTERNATIVE ARGUMENT WAS NOT RAISED BELOW AND IS CONTRADICTED BY THE PLAIN LANGUAGE OF SECTION 506

In its *amicus curiae* brief, the government does not support the reasoning of the court of appeals, and does not support respondents' contention that the estate does not have an interest in abandoned property. Instead, the government raises as its principal contention a new argument in support of the result that the court of appeals reached, theorizing that Section 506(d) applies to void liens only on disallowed claims, that is, claims that are presented to and disallowed by the bankruptcy court. This argument should not be considered by this Court since it was not raised at any stage of the proceedings below. *See, e.g., Heckler v. Campbell,* 461 U.S. 458, 468 n.12 (1983). In any event, the argument is contrary to the plain language of the statute, its legislative history, the majority of lower court decisions and the leading commentators.

As shown by petitioner (Pet. Br. at 17-18), this is not the case. As noted in this Court's recent decision in *Toibb v. Radloff*, 111 S. Ct. 2197, 2201 (1991), "differences in the requirements and protection of each Chapter reflect Congress' appreciation that various approaches are necessary to address effectively the disparate situations of debtors seeking protection under the Code." Third, respondents argue that their position is supported by pre-Code bankruptcy law and the Code's legislative history. Resp. Br. at 27-32. The government and respondents rely on the identical legislative history (*see* Part II below), and that legislative history, despite respondents' suggestion to the contrary, unambiguously reflects that Section 506 was designed to change pre-Code law.

In apparent recognition of the weakness of the government's theory, even respondents do not appear wholly to adopt it, describing it as an "alternative rationale" in four pages at the end of their brief. Resp. Br. at 40-44.

A. The Government's Argument Is Inconsistent With The Language And Structure Of Section 506.

1. Section 506(d) simply does not state that it voids liens only on disallowed claims. Rather, Section 506(d) states that it voids liens "[t]o the extent that a lien secures a claim against the debtor *that is not an allowed secured claim* . . . ." 11 U.S.C. § 506(d) (emphasis supplied).

Section 506(d) follows plainly from, and expands upon, Section 506(a). Section 506(a) specifically states that "*[a]n allowed claim* of a creditor *secured by a lien* on property in which the estate has an interest . . . *is a secured claim* to the extent of the value of such creditor's interest . . ., *and is an unsecured claim* to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim . . . ." 11 U.S.C. § 506(a) (emphasis added). Because, as the government notes, it makes no sense for a lien to secure an unsecured claim (Gov't. Br. at 11), Section 506(a), by limiting the lien to the value of the property, must assume that the lien is being invalidated to the extent that the lien exceeds the value of the property.

Section 506(d) makes eminent sense in light of the objectives of Section 506(a). Section 506(d) formalizes

the result that Section 506(a) requires by explicitly voiding a lien relating to an allowed claim, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim. . . ." 11 U.S.C. § 506(d). Section 506(d) also makes clear that, to the extent that a lien secures a claim that is disallowed, such lien is void. However, as the leading treatise on bankruptcy has noted, the view that only liens based on disallowed claims may be voided by Section 506 "is contrary to the express language of Section 506(d) . . . ." 3 L. King, *Collier on Bankruptcy* ¶ 506.07, at 506-74 (15th ed. 1990).

2. The fact that the other subsections of Section 506 apply to allowed claims provides further support that Section 506(d) is not limited to disallowed claims. *See* 11 U.S.C. § 506(a) ("[a]n allowed claim"), (b)-(c) ("an allowed secured claim"). As in *Ron Pair,* a party seeks here to limit a subsection of Section 506 where the language of that subsection plainly does not do so itself. Here, as in *Ron Pair*, Section 506 must be read as a whole.

3. If Congress had wanted to limit the application of Section 506(d) to disallowed claims, it knew how to do so. Where Congress wanted to specify a disallowed claim, it used, not surprisingly, the term "disallowed." *See, e.g.,* 11 U.S.C. §§ 502, 553(a), 1305 (1988). Congress did not use that phrase in the voiding provision of Section 506(d). Instead, Congress invested that subsection with broad application, choosing to void any lien to the extent that it secures a claim that is "not an allowed secured claim." 11 U.S.C. § 506(d). An *allowed unsecured claim* is plainly "not an allowed secured claim," just as a *disallowed claim* is plainly "not an allowed secured claim."

Again, *Ron Pair* is in point. In that case, the Court discussed whether Section 506(b), which uses the term "agreement," was restricted to consensual liens. The Court noted that, "[w]hen Congress wanted to restrict the application of a particular provision of the Code to such liens, it used the term 'security interest.'" *United States v. Ron Pair Enterprises,* 489 U.S. at 242 n. 5. The Court noted further that, "had Congress intended § 506(b) to apply only to consensual liens, it would have clarified its intent by using the specific phrase 'security interest,' which the Code employs to refer to liens created by agreement." *Id.* Here, as in *Ron Pair*, Congress's decision not to use narrow, well established Code terminology demonstrates that it had a broader purpose in mind.

B. The Legislative History And Prevailing Interpretation Of Section 506 Similarly Refute The Government's Argument.

The government reads the legislative history of Section 506(d) as it reads the language of Section 506(d) -- out of context. In doing so, the government distorts Congress's express understanding that Section 506 would constitute a major change from existing law.

1. Contrary to the government's selective reading, the legislative history of Section 506 as a whole confirms that section's plain meaning. In describing subsection (a), the House Committee Report states:

> [o]ne of the more significant changes from current law in proposed title 11 is the treatment of secured creditors and secured claims. Unlike current law, H.R. 8200 distinguishes between

> secured and unsecured claims . . . . The distinction becomes important in the handling of creditors with a lien on property that is worth less than the amount of their claim, that is, those creditors that are unsecured. . . . By addressing the problem in terms of claims, the bill makes clear that an unsecured creditor is to be treated as having a secured claim to the extent of the value of the collateral, and an unsecured claim for the balance of his claim against the debtor.

H.R. Rep., at 180-81, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6141. Congress thus made clear that, in the 1978 Bankruptcy Code, it was making a "significant change" in "the treatment of secured creditors and secured claims" by limiting a "secured claim to the extent of the value of the collateral."

The government, understandably, ignores the history of Section 506(a), relegating it to a footnote in its brief, and describing the change in Section 506(a) as a "relatively procedural change." Gov't. Br. at 24 n.19. Instead, the government urges that the legislative history of Section 506(d) focuses on just one aspect, *i.e.*, that Section 506(d) operates to void liens on disallowed claims. Gov't. Br. at 23, citing H.R. Rep., at 357, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6313. That the legislative history of Section 506(d) does not mention its application to allowed unsecured claims is not surprising, however, in light of Section 506(d)'s largely formalistic role in voiding liens on allowed unsecured claims, liens that Section 506(a) has itself effectively eliminated. And, as noted by the Eleventh

Circuit, the legislative history of Section 506(d) "does not state on its face that a lien is voidable *only when* the claim is unallowable under Section 502." *Matter of Folendore*, 862 F.2d 1537, 1540 (11th Cir. 1990) (emphasis in original). As this Court similarly noted in *Ron Pair*, the 1978 Bankruptcy Code undertook "a substantial overhaul of the system," and, therefore, "it is not appropriate or realistic to expect Congress to have explained with particularity each step it took." *United States v. Ron Pair Enterprises*, 489 U.S. at 240 (internal citations omitted). Having described the "significant change" wrought by Section 506(a), it is hardly surprising that Congress did not separately describe the role of Section 506(d) in implementing this change.[5]

2. The government does not cite a single case in support of its view that Section 506(d) applies only to disallowed claims, an apparent concession that the courts have not adopted its interpretation. Indeed,

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5 The statement in the legislative history that "[s]ubsection (d) permits liens to pass through the bankruptcy case unaffected" is entirely consistent with petitioner's reading of Section 506. H.R. Rep., at 357, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6313. As the government points out, the historical practice is that a lien passes through bankruptcy unaffected to the extent that the Code does not invalidate it. *See* Gov't. Br. at 28 n.25, citing *City of Dallas v. Ryan (In re Brannon)*, 62 F.2d 959, 961 (5th Cir.), *cert. denied*, 289 U.S. 742 (1933). To the extent that Section 506 does not invalidate a lien, it continues to "pass through bankruptcy unaffected." *See also* H.R. Rep., at 361, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6317 (noting that a bankruptcy discharge "will not prevent enforcement of *valid* liens. The rule of *Long v. Bullard*, 117 U.S. 617 (1886), is accepted with respect to the enforcement of *valid* liens . . .") (emphasis added).

the Eleventh Circuit in *Matter of Folendore* flatly rejected the precise argument presented here. In that case, the Small Business Administration argued, as it does here through the Office of the Solicitor General, that Section 506(d) voids liens only on disallowed claims. The Eleventh Circuit disagreed, stating:

> The plain language of the statute, supported by the decisions of a majority of the bankruptcy courts, inferences drawn from the 1984 amendments, and common sense, requires the SBA's lien be voidable whether or not its claim has been disallowed under section 502. Consequently, we adopt the majority view that section 506(d) allows the voiding of a lien when a court has not disallowed the claim.

862 F.2d at 1539.[6] The leading treatise on bankruptcy has also noted that the view that Section 506(d) voids liens only on disallowed claims is contrary "to the rationale of the better-reasoned cases." 3 L. King, *Collier on Bankruptcy* ¶ 506.07, at 506-74 (citing over twenty cases). *See also* 1 W. Norton, *Norton Bankr. L. & Practice* § 28.27, at 222 (Supp. 1990) ("A majority of cases held that § 506(d) may be used by the debtor to void the unsecured portion of a claim divided under 506(a) or a junior judicial lien.") (citations omitted).

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6 As noted above, the Eleventh Circuit followed the majority view in holding that Section 506(d) is not limited to disallowed claims. 862 F.2d at 1539, citing *In re Garnett*, 88 Bankr. 123, 126 (Bankr. W.D. Ky. 1988); *In re O'Leary*, 75 Bankr. 881, 883 (Bankr. D. Or. 1987); *In re Worrell*, 67 Bankr. 16 (C.D. Ill. 1986); and *In re Tanner*, 14 Bankr. 933 (Bankr. W.D. Pa. 1981).

III. THERE IS NOTHING "UNFAIR" ABOUT INTERPRETING SECTION 506(d) ACCORDING TO ITS PLAIN LANGUAGE

By posing the following hypothetical, respondents suggest that applying the plain language of Section 506 would not produce the "fairest" (Resp. Br. at 10-12) result for creditors:

> Petitioner's position is that, once the court has valued the property, the lien is permanently stripped down to that value. For example, if a foreclosure sale were to bring $60,000 [on property valued at $39,000] petitioner asserts a right to be written a check for $21,000 (minus appropriate interest and sale expenses), even though respondents still have not been paid a large part of the debt that is secured by that property.

Resp. Br. at 11. This alleged dilemma, however, is nothing more than a red herring -- there is no unfairness.

First, "[n]o 'windfall' exists when debtors pay full and fair market value for the property they keep."[7] Respondents' hypothetical assumes that the court performing the Section 506(a) valuation will do so incorrectly.

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7 *See*, Howard, *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, (hereinafter "*Stripping Down Liens*") at 145-46 (Manuscript to be published in 65 Am. Bankr. L.J. (1991)(The manuscript has been lodged with the Court for the Court's convenience).

The assumption, however, should be that the court is making its best effort to accurately asses the value of the property. Indeed, in their Brief for Respondents in Opposition to the Petition for Certiorari ("Op. Cert."), respondents urged that "substantially inaccurate" valuations by the Bankruptcy Court did not "often" occur.[8]

Second, respondents concede that the secured creditor will have an opportunity to be heard on the valuation issue and, if dissatisfied with the result, can take an appeal. Op. Cert. at 9. At the same time, the secured creditor is always free to move, under Section 362(d), for relief from the automatic stay and, if granted, foreclose on the property. 11 U.S.C. § 362(d) (1988). Taking such a course of action should satisfy the creditor that it is receiving the fair market value for the property.[9]

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8 Respondents stated:

> [T]here is no pressing need to address the issue presented here. In any given case, what is at stake is the difference between the judicially determined value and the market value of the property (generally, what it would bring at a sale). *That difference will be large only if the court's determination is substantially inaccurate* or if the property has appreciated substantially since the filing of the bankruptcy petition (if that date is used for valuing the property). *That the difference is not often large is suggested by the failure of either party to take an appeal in virtually all of the cited bankruptcy-court decisions* . . . .

Op. Cert. at 8-9 (footnote and citation omitted) (emphasis supplied).

9 Apparently, respondents chose not to pursue vigorously their lift-stay remedies.

Third, if lienholders fail to pursue their objections and the abandoned property is sold, the result that respondents find objectionable is not unfair -- it is simply the result dictated by the Code. Here, respondents urged the trustee to abandon the property. Joint Appendix ("J.A.") at 23. The estate's interests could be abandoned "to any party with a *possessory interest* in the property abandoned,"[10] and the bankruptcy court found that they were abandoned to petitioner. Pet. App. at 17a n.1. Consequently, petitioner should receive any "excess" from a foreclosure sale. By arguing to the contrary, respondents are requesting that this Court unwind the abandonment. However, "[a]bandonment, once accomplished is irrevocable, regardless of any subsequent discovery that the property had greater value than previously believed." 4 L. King, *Collier on Bankruptcy*, ¶ 544.02, at 544-7 (15th ed. 1990). *See In re Bryson*, 53 Bankr. 3 (Bankr. M.D. Tenn. 1985). (Creditor, previously secured by cause of action that was abandoned, could not reopen the case and pursue debtor who subsequently recovered over $40,000 in such cause of action). Respondents cannot now recover interests that were abandoned by the estate simply because they may have increased in value.

Finally, it is actually respondents' construction that would encourage the type of unfairness that Section 506 was designed to eliminate. Pre-Code law was

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10 H.R. Rep., at 377, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6333; S. Rep. No. 989, 95th Cong., 2nd Sess., at 92, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5878 (emphasis supplied) (hereinafter "S. Rep.").

"ambiguous and vague . . . on whether an undersecured creditor is to be treated as a secured creditor, or as a partially secured and partially unsecured creditor." H.R. Rep., at 181, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6141. "Secured creditors . . . exercised great leverage by virtue of the uncertainty . . . ." *Id.* at 6142. And, under pre-Code law, the debtor was "often required to err on the side of overprotection when formulating a reorganization or repayment plan." *Id.*

The effect of that leverage is readily apparent here. If respondents succeed, they could be free to assert a $120,000 lien against property worth only $39,000. At a foreclosure sale on the property, petitioner would be free to bid at the sale. However, by retaining the entire lien on the property, respondents could continue to outbid petitioner by bidding in "funny money,"[11] which exists because there is no cost to respondents in bidding the property up to the amount of the lien, there being typically no assets for the payment of unsecured claims. This ability to increase the bidding at no cost to respondents would allow them to pressure petitioner into paying a higher price for the property than its fair market value. Alternatively, respondents could use this leverage to coerce petitioner into reaffirming part or all of the prepetition obligations that she owes to respondents. Respondents' position would leave them free to engage in the very use of leverage that the statute was designed to prevent.

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11 "Funny money" is the term used to describe the sum of "money," above the fair market value of the property, available to the lienholder for increasing its bid at the foreclosure sale. *See Stripping Down Liens*, at 134.

IV. RESPONDENTS' OTHER ARGUMENTS ARE WITHOUT MERIT

A. Section 506(d) Applies To Real As Well As Personal Property.

In a brief discussion in their "abandonment" argument, respondents appear also to urge that Congress could not have intended that Section 506(d) would apply to real property because real property was not included in the type of property that could be redeemed under Section 722. As petitioner explained in her opening brief (Pet. Br. at 23-25), no such limitation appears in Section 506; respondents' argument is wholly inconsistent with the structure of the Code, and the leading bankruptcy treatise rejects this view as being "directly contrary to the clear language of section 506(d)." 3 L. King, *Collier on Bankruptcy*, ¶ 506.07, at 506-75.

Section 506(d) permits voiding of unsecured liens. *Matter of Folendore*, 862 F.2d at 1540; *see also Gaglia v. First Federal Sav. & Loan Ass'n*, 889 F.2d 1304, 1310 (3rd Cir. 1989). But with respect to "tangible personal property intended primarily for personal, family, or household use" (11 U.S.C. § 722 (1988)), Congress apparently believed that the voiding of the liens was insufficient because the state laws governing redemption of such personal property for bankrupts were too narrow (*see* S. Rep., at 95, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 5881), whereas the laws governing

redemption of real property were adequate.[12] For these reasons it is not surprising that redemption of personal property is treated separately from merely stripping down liens on all types of property.

B. Section 506(a) Does Not Provide For Multiple Valuations

Respondents argue that if Section 506(d) is applied to petitioner's property, then the amount of respondents' secured claim should be revalued in the event that more than $39,000 is paid for the property at a foreclosure sale. Resp. Br. at 44. As with the government's alternative argument, the Court should not consider respondents' argument because it was not raised in the briefs below. *See, e.g., Heckler v. Campbell*, 461 U.S. at 468 n.12.

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12 Debtors who pledge real property have greater redemption rights under state law than debtors who pledge personal property. For example, the debtor who pledges real property typically has 90 or more days to redeem the property upon default. *See, e.g.* Utah Code Ann. § 57-1-31 (1990). In contrast, state law, typically governed by Article 9 of the Uniform Commercial Code ("U.C.C."), severely restricts the debtor's redemption rights. *See* U.C.C. § 9-503 ("Unless otherwise agreed a secured party has *on default* the right to take possession of the collateral. . . . Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504."); *See* U.C.C. § 9-506. (the debtor cannot redeem personal property if, "the secured party has disposed of the collateral or entered into a contract for its disposition").

In any event, respondents' argument assumes that, after Section 506 is applied to void their unsecured lien, the property will be sold at foreclosure. However, petitioner intends to redeem the property for its fair market value, and there will be no foreclosure sale. Even assuming that the property were sold at foreclosure, there is no authority for respondents' novel argument. Section 506(a) provides for a single valuation -- not multiple revaluations whenever a creditor (or debtor) believes that the value has increased (or decreased). Revaluing property subject to Section 506 would introduce the very uncertainty that Congress sought to eliminate when it enacted that section.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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